90-502

No. _____

In The

Supreme Court of the United States

October Term, 1990

TOM PERDUE,

Petitioner,

vs.

J. MAC BARBER,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE GEORGIA COURT OF APPEALS

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QUESTIONS PRESENTED

1. In a public official libel/slander action brought in state court, how should substantive federal constitutional principles be applied in considering motions for summary judgment?

2. Does the opinion of the Georgia Court of Appeals, reversing the grant of summary judgment to Petitioner, conflict with *New York Times v. Sullivan*, 376 U.S. 254 (1964), and its progeny and place an unlawful burden on political speech, which speech is at the core of First Amendment protection?

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PETITION FOR WRIT OF CERTIORARI TO THE GEORGIA COURT OF APPEALS

Petitioner, Tom Perdue, respectfully prays that a writ of certiorari issue to review the judgment of the Georgia Court of Appeals rendered in this case on December 20, 1989.

OPINIONS BELOW

The opinion of the Georgia Court of Appeals dated December 20, 1989, is reported at 194 Ga. App. 287, 390 S.E.2d 294 (1990), and is reproduced in Appendix A to this Petition beginning at page A1. The order of the Superior Court of Fulton County, Georgia, is not reported, and is reproduced in Appendix B of this Petition, at page A21.

JURISDICTION

The judgment of the Georgia Court of Appeals was entered on December 20, 1989. A motion for rehearing was denied on January 23, 1990, and a timely Petition for Writ of Certiorari was filed with the Georgia Supreme Court. That petition was denied on June 21, 1990, and a motion for reconsideration of said denial was denied by the Georgia Supreme Court on July 30, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

First Amendment to the United States Constitution

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and petition the Government for a redress of grievances.

Fourteenth Amendment to the United States Constitution Section 1

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

This is an action for libel and slander alleged to have been made by one political figure, Petitioner Tom Perdue, against another political figure, Respondent J. Mac Barber, during the course of a political campaign. Barber claims that Perdue defamed him in a letter sent by Perdue to various local government officials in Georgia in connection with Barber's campaign for election to the Georgia Public Service Commission ("PSC") and in oral statements to the same effect as the letter.

The letter, which is set forth in Appendix H (A46-47) to this Petition, concerned the circumstances surrounding Barber's resignation from the PSC in February 1985. Essentially, Perdue stated in the letter that Barber had taken what amounted to a bribe, and when confronted by Georgia Attorney General Michael Bowers ("Bowers"), had resigned to avoid being indicted and convicted for bribery.

The background to the sending of the letter is important. In 1984 and 1985, the Georgia Bureau of Investigation ("GBI") conducted an investigation into allegations of bribery in the PSC, of which Barber was a member. In February 1985, Attorney General Bowers requested and was granted a conference with Governor Joe Frank Harris concerning the investigation of Barber. At Governor Harris' request, Perdue, then the Governor's Chief Administrative Officer, also attended the meeting.

At the February 1985 meeting, Perdue heard Attorney General Bowers tell the Governor that he (Bowers) intended to seek an indictment against Barber for bribery, that the evidence against Barber was strong, and that a conviction was likely. However, Bowers stated that he would like to offer Barber the opportunity to resign his office and, if he did resign, Bowers would not seek an indictment. At the meeting, Perdue also heard Governor Harris tell Bowers he agreed that the evidence seemed sufficient to seek an indictment. Perdue believed Bowers' assessment of the information regarding Barber and the probability of obtaining a conviction for bribery.

Following the February 1985 meeting, Barber and Attorney General Bowers entered into a written agreement providing that Barber would resign from the PSC and that the government would not prosecute on the basis of the facts then in hand. Barber did in fact resign and the indictment, which had already been prepared by Bowers, was never presented to the grand jury. (However, indictments of other individuals were presented.) Shortly after Barber's resignation, GBI Director Phil Peters told Perdue that he considered the evidence against Barber to be more than sufficient to obtain a conviction for bribery and that it was a mistake to let Barber just resign his seat on the Commission.

Approximately eighteen (18) months after Barber's resignation, he qualified to run for election to the same seat he had vacated. Governor Harris' campaign strategy for Gary Andrews, the incumbent he appointed to replace Barber, included increasing public awareness of the circumstances surrounding Barber's resignation from the PSC. Therefore, Andrews held a press conference discussing the details of Barber's resignation. Perdue was then requested by the Governor to follow up the press conference with a letter which would include the circumstances leading to Barber's resignation.

The undisputed evidence shows that prior to sending his letter Perdue carefully investigated and confirmed its accuracy, in effect quadruple-checking it. Of course, Perdue had been present when the Attorney General stated that Barber was about to be indicted, and Perdue had first-hand knowledge of the deal allowing for Barber's resignation. Perdue also knew Barber resigned in accordance with the deal, and had heard the opinions of the

Attorney General, GBI Director, and Governor as to Barber's guilt. However, prior to sending his letter, Perdue also reviewed the GBI's file on the Barber investigation. In particular, he reviewed the summary of the investigation which was included in the Memorandum of Assistant Attorney General Harrison Kohler. The Kohler Memorandum confirmed Perdue's recollection of the earlier conversation to which Perdue had been privy between Bowers and the Governor, as well as the conversations Perdue had with Bowers and GBI Director Peters concerning the circumstances surrounding the investigation.

After reviewing the GBI file and drafting the letter, and prior to its mailing, Perdue discussed the contents of the letter with Attorney General Bowers and made changes pursuant to Bowers' suggestions. After his discussion with the Attorney General, Perdue was not only satisfied that the letter was true, he was satisfied that it accurately represented the technical legal aspects of the bribery investigation prosecution.

Furthermore, prior to mailing the letter, Perdue also submitted a draft of the letter to Barbara Morgan, the Governor's News Secretary, for final editing, and requested that she give a copy of the letter to attorney Rick Stancil, the Governor's Assistant Executive Counsel, for his review and opinion. Ms. Morgan gave the letter to Mr. Stancil, who concluded that the representations made in the letter concerning Barber accurately reflected the circumstances and the results of the investigation as set out in the Kohler Memorandum and the GBI file. Mr. Stancil communicated his approval to Ms. Morgan, who

reported Mr. Stancil's comments to Perdue prior to the mailing of the letter.

At the time of mailing the letter, Perdue believed the truth and accuracy of the information conveyed to him by Attorney General Bowers and GBI Director Peters, as well as the information contained in the GBI file, which he personally reviewed, concerning Barber's acceptance of what amounted to a bribe. In August 1986, when he wrote the letter, Perdue had no doubt – and no reason to doubt – that Barber was guilty of betraying the public trust in accepting what amounted to a bribe. Perdue has testified that he still believes the truth and accuracy of this information.

Prior to writing the letter, Perdue never heard Governor Harris, Attorney General Bowers, GBI Director Peters, any member of the Governor's staff, any member of the Attorney General's staff, or any member of the GBI express any doubt or reservation as to their opinion that Barber had taken a bribe. He further never heard any of them express a doubt that had Barber not resigned from office, he would have been indicted and convicted of bribery.

Perdue moved for summary judgment in his favor on the grounds that the alleged defamation was constitutionally protected due to the absence of actual malice. The trial court agreed and entered summary judgment. Appendix B (A21).

Barber appealed the summary judgment to the Georgia Court of Appeals. On December 5, 1989, in a 5-4 decision, the Court of Appeals affirmed the trial court. Appendix C (A22-40). Barber filed a motion for rehearing.

On December 20, 1989, the Court of Appeals granted Barber's motion (Appendix D (A41)), and substituted a new opinion for the former opinion. One judge who had at first voted with the majority had switched his vote to the dissent, thus making the decision 5-4 for reversing the lower court. Perdue's Petition for Writ of Certiorari to the Georgia Supreme Court was denied by a 4-2 vote (Judge Benham, the author of the original Court of Appeals decision, and the dissent in the final decision, had been elevated to the Supreme Court and thus abstained from voting on the petition). Appendix F (A44). A motion for reconsideration in the Georgia Supreme Court was also denied 4-2. Appendix G (A45).

REASONS FOR GRANTING THE WRIT

1. Summary Procedures And Their Relationship To Substantive Constitutional Rights.

Summary judgment has traditionally caused considerable problems in public figure libel/slander cases. *See* Louis, *Summary Judgment and the Actual Malice Controversy in Constitutional Defamation Cases*, 57 S. Cal. L. Rev. 707 (1984). On the one hand are important litigation rights of plaintiffs. On the other hand is the fact that summary procedures are themselves significant to substantive constitutional rights under the First Amendment. As stated in *Washington Post Co. v. Keogh*, 365 F.2d. 965, 968 (D.C. Cir. 1966), *cert. den.*, 385 U.S. 1011 (1967):

> In the First Amendment area, summary procedures are even more essential. For the stake here, if harassment succeeds, is free debate. One

> of the purposes of the [*New York Times v. Sullivan*] principle, in addition to protecting persons from being cast in damages in libel suits filed by public officials, is to prevent persons from being discouraged in the full and free exercise of their First Amendment rights with respect to conduct of their government. The threat of being put to the defense of a lawsuit brought by a popular public official may be as chilling to the exercise of First Amendment freedoms as fear of the outcome of the lawsuit itself, especially the advocates of unpopular causes . . . . Unless persons, including newspapers, desiring to exercise their First Amendment rights are assured freedom from the harassment of lawsuits, they will tend to become self-censors. And to this extent, debate on public issues and the conduct of public officials will become less uninhibited, less robust, and less wide opened, for self-censorship affecting the whole public is "hardly less virulent for being privately administered." *Smith v. People of the State of California*, 361 U.S. 147, 154, 80 S. Ct. 115, 219, 4 L. Ed. 2d 205 (1959).

Further, as recognized in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), there is a critical link between substantive law and summary judgment procedure in libel/slander cases.

The case presented by this Petition presents an opportunity for this Court to clearly define the rules applicable to summary judgment motions in public figure libel/slander cases in state court forums (Respondent concedes he is a public figure). Under the hazy contradictions of summary judgment procedure, the Georgia Court

of Appeals has rendered a decision substantively repugnant to the constitutional standards established heretofore by this Court in public figure libel/slander cases.

2. The Unanswered Questions About *Anderson v. Liberty Lobby, Inc.*

Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986), established that in motions for summary judgment in public figure defamation actions brought in federal court, the issue for determination by the trial court is whether a reasonable jury might find that actual malice had been shown by clear and convincing evidence. Although the *Anderson* rule has been adopted by some state courts, it has been rejected by others, clearly as not being constitutionally based. *E.g.*, *Moffatt v. Brown*, 751 P.2d 939 (Alaska, 1988); *Dairy Stores, Inc. v. Sentinel Publishing Co.*, 104 N.J. 125, 516 A.2d 220 (1986).

Moreover, the practical utility of the *Anderson* rule has been questioned. For example, in *Celebrezze v. Dayton Newspapers, Inc.*, 41 Ohio App. 3d 343, 535 N.E.2d 755 (1988), it was noted:

> Appellant and appellees rely on *Anderson v. Liberty Lobby, Inc.* . . . Appellant argues that the trial court used the wrong standard in applying *Anderson*, and the appellees insist the trial court's action is supported by *Anderson*. This is understandable since, as noted by Justice Rehnquist's dissent, the decision in *Anderson* sets forth several standards (which is no standard at all). . . .

Both Justices Rehnquist and Brennan in their separate dissents in *Anderson* criticized the majority opinion for failing to provide trial judges with adequate guidelines:

> Instead of this illustrating how the rule works, [the majority] contents itself with abstractions and paraphrases of abstractions, so that its opinion sounds much like a treatise about cooking by someone who has never cooked before and has no intention of starting.

477 U.S., at 269 (Rehnquist, J., dissenting);

> I am more troubled by the fact the Court's opinion sends conflicting signals to trial courts and reviewing courts which must deal with summary judgment motions on a day-to-day basis. This case is about a trial court's responsibility when considering a motion for summary judgment, but in my view, the Court, while instructing the trial judge to "consider" heightened evidentiary standards, fails to explain what that means. In other words, how does a judge assess how one-sided evidence is, or what a "fair-minded" jury could "reasonably" decide? The Court provides conflicting clues to these mysteries, which I fear can lead only to increased confusion in the district and appellate courts.

477 U.S., at 265 (Brennan, J., dissenting).

The case presented by this Petition is an example of the confusion concerning the application of the *Anderson* rule and shows a badly divided and flip-flopping appellate court becoming so enmeshed in the procedural conundrum that substantive, constitutionally based principles were grossly misapplied.

This case thus presents an excellent vehicle to clarify questions concerning the application of *Anderson* and to

clarify what, if any, considerations on summary judgment are of constitutional stature and must be applied by state courts in libel/slander cases.[1]

3. The Facts In This Case Are Compelling In Favor Of Summary Judgment To The Defendant.

It is difficult to imagine a more compelling case for the grant of summary judgment to a defamation defendant than the case at bar. First, of course, this case involves political speech, which is jealously protected by the First Amendment and thus "presents what is probably the strongest possible case for the application of the *New York Times* rule." *Ocala Star-Banner Co. v. Damron*, 401 U.S. 295, 300 (1971).

Next, Perdue was actually *present* when the Georgia Attorney General told the Governor that he intended to indict Barber. Perdue also had first-hand knowledge of the deal struck by Barber to avoid the indictment. Further, the director of the Georgia Bureau of Investigation, the state equivalent of the FBI, told Perdue that he considered the evidence against Barber to be more than sufficient to obtain a conviction for bribery and that it was a mistake to simply let Barber resign.

---

[1] It is evident from the majority opinion of the Georgia Court of Appeals that undue weight was given to the footnote in *Hutchinson v. Proxmire*, 443 U.S. 111, 120, n. 9 (1979) that summary judgments in libel/slander actions are not favored. This Court retreated from this footnote in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986).

In addition to the first-hand knowledge outlined above, when Perdue was asked by the Governor to send the letter in issue, Perdue (1) reviewed the GBI file on the bribery investigation, (2) discussed the letter with the Attorney General, (3) submitted a draft of the letter to the Governor's news secretary, and (4) received approval of an attorney on the Governor's staff.

When he wrote the letter in issue, Perdue had no doubts that the letter was true and accurate – he had verified his own first-hand knowledge with several trustworthy sources, including the two highest-ranking law-enforcement officials in the executive branch of Georgia's government.

4. The Georgia Court of Appeals' Opinion Shows The Distortion Of Substantive Constitutional Principles Through The Procedure Of Summary Judgment.

Against the foregoing facts showing an absence of constitutional "malice," the majority of the Georgia Court of Appeals held that the following circumstances justified denying summary judgment to Perdue:

- The existence of "opportunities for having or obtaining, from objective sources, a knowledge of true facts prior to publication," a factor deemed insufficient in *St. Amant v. Thompson*, 390 U.S. 727 (1968) (failure to investigate is inadequate proof of actual malice);
- The credibility of witnesses, a factor deemed insufficient in *Harte-Hanks Communications, Inc. v. Connaughton*, ___ U.S. ___, 109 S. Ct. 2678 (1989);
- Perdue allegedly "did not personally check the facts" (presumably referring to his

obtaining the facts from the Georgia Attorney General, GBI, and Governor's Office), a new and aberrant standard in libel/slander cases, but in essence, merely a variant of the "failure to investigate" standard repudiated in *St. Amant, supra;*

- The existence of "contrary information" in the GBI file, from which "serious doubts" could be inferred, once again a new and deviant standard in libel/slander cases and a clear diminution of the "high degree of awareness of probable falsity" test, *Garrison v. Louisiana,* 379 U.S. 64, 75 (1964);

- The GBI file disclosed that the trucking company official's sentence was for an incident not involving Barber from which it is surmised that Perdue either knew "or did not seek to verify otherwise," which is once again a variant of the "failure to investigate" rule of *St. Amant;*

- The trucking official pled *nolo contendre* and received a "first offender" sentence and therefore was technically not convicted with a finding of guilt, a fact having no relevance to "subjective awareness of probable falsity," *Gertz v. Robert Welch, Inc.,* 418 U.S. 323 (1974);

- Since the accusation against Barber had not been proved beyond a reasonable doubt in a court of law, then Perdue *ipso facto* knew Barber was not "guilty" of bribery, a standard absolutely foreign to any libel/slander case heretofore reported (the Georgia Court of Appeals appears to be saying that any imputation of a crime will not survive summary judgment unless the plaintiff was convicted of that crime);

- Perdue had no basis on which to draw the "unqualified conclusion" that Barber

resigned rather than face indictment "and conviction," although this opinion flowed naturally from the threat of indictment and is obviously an opinion and conclusion about Barber's motives;

- The memorandum of the State Law Department upon which Perdue relied "does not conclusively establish the facts as a matter of law," once again setting a new standard that the facts upon which a speaker relies must be proved in a court of law prior to utterance;

- The speech was politically motivated, which is insufficient under *New York Times v. Sullivan*, 376 U.S. 254 (1964), among other cases;

- Perdue acted personally, rather than through the Governor's Office, which is another new and unusual standard in libel/slander law;

- There is an alleged dispute as to whether Perdue knew of doubt held by third parties (the Attorney General, GBI, and Law Department), which is surely irrelevant under the constitutional standard requiring proof that Perdue himself had a "high degree of awareness of probable falsity" and "entertained serious doubts," *see St. Amant, supra.*

Barber v. Perdue, Appendix A, at A5-8.

In short, through the rationale and justification of summary judgment procedure, the Georgia Court of Appeals in this case resurrected the long-discarded doctrine of the "reasonable man" standard in public figure libel/slander cases, *see Garrison v. Louisiana*, 379 U.S. 64 (1964), and applied substantive principles which are repugnant to *New York Times v. Sullivan*, 376 U.S. 254 (1964), and its progeny.

An excellent summary of the errors of the majority opinion of the Georgia Court of Appeals, and of the important constitutional interests implicated by that opinion, is found in the dissent of Judge Benham:

> In its reliance on inferences based on circumstantial evidence, the majority loses sight of the standard of proof it espoused at the outset of its opinion: actual malice must be proved by clear and convincing evidence. The "objective undisputed facts" which the majority holds out as having a bearing on the issue of malice are not so objective as is asserted. Most of those "objective facts" show only that the events giving rise to this action were political in nature. I am not ready to assert that the fact that speech occurs in the context of political activity, that it is intended to discredit a candidate for office to whom the speaker is politically opposed, that the communication is on a private letterhead, and that it was made for the purpose of influencing votes is evidence of actual malice. Such a holding, which is what the majority advances, would seriously inhibit the heretofore uninhibited give-and-take which is inherent in the political process in this country.

194 Ga. App. at 297; Appendix A, at A18-19.

CONCLUSION

For the reasons set forth above, Petitioner respectfully request that this petition be granted.

Respectfully submitted,

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APPENDIX A

Final Georgia Court of Appeals Opinion

IN THE COURT OF APPEALS STATE OF GEORGIA

J. MAC BARBER, Appellant,	)	Docket No. A89A1420
v.	)	
TOM PERDUE, Appellee.	)	

BEASLEY, JUDGE.

Appellant Jack McWhorter "Mac" Barber filed a lawsuit against appellee, Tom Perdue, a former administrative aide to the governor, alleging that Perdue had libeled and slandered Barber. This appeal follows the grant of summary judgment to Perdue.

The alleged libel was contained in a letter sent out by Perdue at the beginning of August 1986 to approximately 350 various city and county officials throughout Georgia during the 1986 political campaign for a seat on the Public Service Commission. Appellant had resigned from the PSC seat in February 1985 and then qualified to run in the 1986 election against Gary Andrews, a recent appointee to the position from which Barber had resigned. In July 1986, an Andrews press conference was held at which certain public documents from an investigative file on Mac Barber were released. Shortly thereafter Perdue sent the letter, as follows, on plain stationery with his home address:

> Lately, I have called on you often to ask for your assistance, and there is no way to really

express in a letter my appreciation for the consideration and response you have provided. Now, once again, I must ask for your help.

A year and a half ago, a Public Service Commissioner betrayed the public trust and tarnished his own reputation and, indirectly, that of all public officials by accepting what amounted to a bribe. When confronted with the fact that the Attorney General and the Georgia Bureau of Investigation had this information and were about to seek a felony indictment, Mac Barber chose to resign his office rather than face the prospect of indictment and conviction. The trucking company official who gave Mac Barber the money was convicted and fined a total of $12,000.00!

This situation has occurred twice since Governor Harris has been in office. The first official was, as you remember, Sam Caldwell, who also betrayed the public trust and later was convicted of defrauding the state. Under pressure, he resigned as Labor Commissioner. To my way of thinking, Mac Barber and Sam Caldwell are two of the biggest embarrassments that state government has ever suffered.

As specified by the State Constitution, when these vacancies occurred, Governor Harris was required to make appointments to fill them. In the case of the Labor Commissioner, the Governor appointed Joe Tanner, and in the case of the Public Service Commissioner, he appointed Gary Andrews. In contrast to their predecessors, these two men epitomize what a public servant should be. They have integrity and character and stand for what is right, good, and fair. While managing the responsibilities of their jobs, they also have had to rebuild the public

> trust and confidence Mac Barber and Sam Caldwell destroyed in those positions and in state government.
>
> My request of you at this time is that you please do everything you possibly can during the last week of the campaign to make sure that Gary Andrews and Joe Tanner are elected. The people of Georgia deserve officials they can trust and honesty in state government.

The alleged slander consisted of Perdue's comments to an Albany newspaper reporter along the same lines as the letter.

"A libel is a false and malicious defamation of another, expressed in print . . . , tending to injure the reputation of the person and exposing him to public hatred, contempt, or ridicule," OCGA § 51-5-1 (a). "Libel per se consists of a charge that one is guilty of a crime, dishonesty or immorality. [Cit.]" *Grayson v. Savannah News-Press*, 110 Ga.App.561, 566 (139 SE2d 347) (1964). "Slander or oral defamation consists in: (1) Imputing to another a crime punishable by law . . . . " OCGA § 51-5-4 (a). Bribery is such a crime. OCGA § 16-10-2.

Appellant concedes, for purpose of this action, that he is a "public figure" who is prohibited "from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice' – that is, with knowledge that it was false or with reckless disregard of whether it was false or not." *New York Times v. Sullivan*, 376 U.S. 254, 279-280 (84 SC 710, 11 LE2d 686) (1964). Inasmuch as the First Amendment mandates that a public figure plaintiff prove actual malice by clear and convincing evidence (id. at 285-286; *Harte-Hanks Communications v. Connaughton*,

___ U.S. ___ (109 SC 2678, 105 LE2d 562) (57 LW 4846) (1989); *Williams v. Trust Co. of Ga.*, 140 Ga. App. 49, 52 (230 SE2d 45) (1976)), "a court ruling on a motion for summary judgment [in such a case] must be guided by the *New York Times* 'clear and convincing' evidentiary standard in determining whether a genuine issue of actual malice exists – that is, whether the evidence presented is such that a reasonable jury might find that actual malice had been shown with convincing clarity." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 257 (106 SC 2505, 91 LE2d 202) (1986).

The case is not ripe for summary judgment in favor of defendant as the moving party. The four-volume record shows that there are material factual disputes which are relevant to the issue of knowledge or at least reckless disregard, which themselves are material to the pivotal issue of actual malice in the promulgator's issuance of the statements.

In deciding motions for summary judgment, our rule is the same under OCGA § 9-11-56 as is the rule under FRCP 56. The Supreme Court framed it: "The evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor. *Adickes [v. S. H. Kress & Co.]*, 398 US [144], at 158-159. . . . " *Anderson*, supra at 255, *Eiberger v. West*, 247 Ga. 767 (281 SE2d 148) (1981); *Burnette Ford v. Hayes*, 227 Ga. 551 (181 SE2d 866) (1971). The question of law before us is whether in this posture, viewing all the direct and circumstantial evidence and reasonable inferences in plaintiff's favor, a jury could find by clear and convincing evidence that defendant sent the letter or made any of the untrue statements " 'with knowledge that it was false or with reckless disregard of

whether it was false or not.' " *Anderson*, supra at 244, quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-280, supra. Such would constitute the element of actual malice which is an ingredient of a defamation case of this type.

Although "clear and convincing" is a more stringent standard than "preponderating" and requires a greater quantum and a high quality of proof in plaintiff's favor. *Anderson*, supra at 254, it has been recognized that proof of actual malice "does not readily lend itself to summary disposition," *Hutchinson v. Proxmire*, 443 U.S. 111, 120, n. 9 (99 SC 2675, 61 LE2d 411) (1979). See Wright, Miller & Kane, Federal Practice & Procedure: Civil 2d, § 2730, pages 240-245. This is because, as said in *Hutchinson*, proof of actual malice "calls a defendant's mind into question." Proof of state of mind "could be in the form of objective circumstances from which the ultimate fact could be inferred" as well as direct evidence from defendant. *Herbert v. Lando*, 441 U.S. 153, 160 (99 SC 1635, 60 LE2d 115) (1979). Because of the very nature of this element of the tort, *Herbert* pointed out that "[c]ourts have traditionally admitted any direct or indirect evidence relevant to the state of mind of the defendant and necessary to defeat a conditional privilege or enhance damages." Id. at 165. Evidence of motive may bear a relation to the actual malice inquiry. *Harte-Hanks Communications*, supra, 57 LW at 4849.

Because of the opportunities for having or obtaining, from objective sources, a knowledge of the true facts prior to publication of the statements, which on their face were libelous if not true, OCGA § 51-5-4 (a), defendant has not conclusively eliminated a finding of actual malice

which finding is based on clear and convincing evidence. Much of what is in dispute depends, for its resolution, on the credibility of witnesses. Defendant's own denial of actual malice is not conclusive in the presence of evidence to the contrary. *St. Amant v. Thompson*, 390 U.S. 727, 732 (88 SC 1323, 20 LE2d 262, 268) (1968). Not only direct evidence, but circumstantial evidence and reasonable inferences, are for a factfinder's sifting. *Harte-Hanks Communications*, supra, as illustrative.

That is outside of our circumscribed function as an appellate court, *Guye v. Home Indem. Co.*, 241 Ga. 213 (244 SE2d 864) (1978), and was so for the trial court. OCGA §§ 24-9-80; 9-11-56. As the Supreme Court reiterated in the *Anderson* summary judgment case, supra at 255: "Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions not those of a judge, [when] he is ruling on a motion for summary judgment. . . ."

There is evidence that defendant did not personally check the facts in the letter before sending them out from his home under the weight of his signature, knowing that he was identified as the governor's administrative aide. He deposed that he reviewed the GBI file, which contained contrary information which at the least could be inferred that defendant "entertained serious doubts as to the truth of his publication." *St. Amant*, supra at 731. Nevertheless, he instructed an assistant counsel to compare what was said in the letter only with what was in the law department's summary memo. Defendant knew from the GBI file, or did not seek to verify otherwise, that the trucking company official's sentence was for an incident not involving Barber. If he knew this to be true, a jury

could infer that its inclusion in the letter about Barber was a deliberate implication that Barber's guilt, though not established by conviction, was a confirmed fact or at least a foregone conclusion upon which the letter recipients could rely in acting.

In addition, the law department memo itself stated that the official pleaded nolo contendere and was given first offender status; it was not a conviction, not a finding of guilt. Yet the jury could find that the letter-writer's statement clearly implied that the official was guilty as a matter of law, and that he parlayed this as fact to verify the guilt of plaintiff in the same transaction.

In addition, there is undisputed evidence that defendant knew that plaintiff had not been convicted or even indicted for bribery, yet stated that he was guilty of it. A jury can reasonably infer that he stated his opinion as though it were an official fact, despite the accusation's not having been proved beyond a reasonable doubt in a court of law. Adding the words "what amounted to" does not detract from the direct statement that Barber accepted a bribe, for it can reasonably be construed to mean only that it was ostensibly given for another purpose. Whether Barber would have been convicted or not is fraught with the imprecision of the application of the bribery law, OCGA § 16-10-2, in "campaign contribution" cases, as illustrated by the recent case of *State v. Agan*, 259 Ga. 541 (384 SE2d 863) (1989).

The letter also states that the reason Barber resigned was that he chose resignation rather than indictment "and conviction," as though conviction were a certainty. Defendant had no basis on which to draw such an

unqualified conclusion regarding conviction. Also, there is evidence that the reason for resignation was otherwise and that he did not know what motivated Barber to resign. Yet a jury could find that the author of the letter implied that resignation was attributable to an acknowledgment of guilt, despite Barber's denial to this day of any wrongdoing. This statement, too, was used in the letter to verify the truth of the statement that Barber had accepted a bribe.

The state law department memorandum does not conclusively establish the facts as a matter of law. It contains the results of investigation, made for the purpose of possible prosecution; what it states as facts were never tested in a court of law and many of them remain in dispute in this separate civil case, as is apparent from plaintiff's evidence. The latter, for one thing, weaves other assertions of fact into the outline to give what plaintiff contends to be a more complete picture.

Among the objective undisputed facts which have a bearing on the issue of actual malice are that defendant had access to the true facts, that this action was taken by defendant in an effort of discredit plaintiff as one who should be returned again to the state's Public Service Commission, that it was done in the heat of political campaign, that it was directed to local officials to influence them, that it was done with an assessment that it would have an impact on significant numbers of votes, that it was accomplished not as an official act but as a personal communication outside of the governor's office. Disputed was whether defendant knew of the doubts which the GBI and the attorney general and law department had.

The subtlety inherent in ascertaining a person's state of mind, and the nuances discernible from objective and not only subjective evidence, in this case where plaintiff has come forth with disputing evidence on material facts about what defendant knew and upon what basis he acted, where plaintiff does not rely on the pleadings or only on the proposition that the jury might disbelieve the defendant's denial of legal malice, see *Anderson*, supra at 256, required the trial court to deny the motion for summary judgment.

Judgment reversed. Carley, D. J., Deen, P. J., Banke, P. J., and Pope, J., concur, Deen, P. J., also concurs specially. McMurray, P. J., Birdsong, Sognier and Benham, JJ., dissent.

DEEN, Presiding Judge, concurring specially.

While concurring fully with the majority opinion, I add the following comments.

"The privilege of poisoning one's enemy is not a thing of value," *Foster v. State*, 8 Ga. App. 119, 123 (68 SE 739) (1910), but it may be a constitutional right, even where the poisoning is verbal, vociferous, and vexatious, and the victim is a public figure. However, notwithstanding the liberties afforded in the course of political zeal and public debate about public figures, poison falsely served with actual malice is still actionable. A factual issue exists over the determinative question of actual malice in the instant case.

"Malice in the constitutional sense is distinguished from the common law sense of ill will, hatred, or 'charges calculated to injure' . . . Constitutional malice does not involve the motives of the speaker or publisher, though

they may be wrong, but rather it is his awareness of actual or probable falsity, or his *reckless disregard* for their falsity." *Williams v. Trust Co. of Ga.*, 140 Ga. App. 49, 55-56 (230 SE2d 45) (1976). (Emphasis supplied.) Our Georgia rule has been amended or modified to the extent that now a mini, modicum, or moderate amount of evidence concerning motive, which specifically bears a relationship to the actual malice inquiry, may be considered. *Harte-Hanks Communications v. Connaughton*, ___ U.S. ___ (109 SC 2678, 105 LE2d 562) (57 LW 4846) (1989). In the instant case, it was uncontroverted that Perdue intended to injure Barber's reputation; it is all apparent from his acts of affirmative action in seeking assistance of the attorney general in formulating part of the letter, and having the governor's press secretary edit the letter, that he was deleterious, dedicated, and deliberate in designing his attack on Barber's integrity, impartiality, image, and independence. The head of the special prosecution division stated in his deposition (albeit 16 months after the letter was published) that it would be dangerous to send out this type letter. He explained his use of the word "dangerous" as meaning there was a potential for a lawsuit.

That desire, deliberation, and design to injury, alone, would not suffice to prove libel or slander of a public figure. However, I believe that, considering facts such as the conspicuous juxtaposition of Perdue's (a) accusation of Barber accepting a bribe with (b) the factually misleading statement that "[t]he trucking company official who gave Mac Barber the money was convicted and fined a total of $12,000.00," along with (c) Perdue's statement to Barber regarding Barber's intention to run for re-election to the Public Service Commission, "We could sure use

that seat," combined with admissions as to his letter being intended to brand Barber as a "crook" and in the "same category as Sam Caldwell," see *Jordan v. Hancock*, 91 Ga. App. 467 (86 SE2d 11) (1955) (liar, crook, thief, and cheat); *Stone v. McMichen*, 186 Ga. App. 510 (367 SE2d 839) (1988) (crook and thief), Perdue misplaced his calculations and confidence in his cleverness and crossed over the line into constitutional malice. Implicit in the juxtaposition noted above is the representation that the trucking official was convicted of bribing Barber, which Perdue knew to be false or *would have known absent a reckless disregard for the truth.*

The dissent relies on *Hustler Magazine v. Falwell*, 485 U.S. 46, 53 (108 SC 876, 99 LE2d 41) (1988). Language used in this cited case suggested that Falwell is a public figure, and his first sexual experience was incest with his mother in an outhouse. These expressions, made in a sexual context, are about on par, or possibly stronger and more unsavory, than the letter set out to some 350 city and county officials, done in a political context, in the instant case. The distinction, difference, and distinguishing discernment in the two being, the former made in a magazine, was labeled a "parody" and was facetious, felicitous, fanciful, and fictional, while the latter letter is sent out as, and in, a staunchly serious sophisticated scenario. While acknowledging that debate on public issues about public figures should not be curtailed or inhibited, the defense by a private citizen or an elected public official, be he legislator, judge, governor, or other public servant, who is called a "crook," or is labeled guilty of violating our criminal code or of committing a crime, should likewise not be curtailed, chilled, censored,

or shortchanged in seeking a jury trial in his challenge in the courts of our state to arrive at truth in the matter where factual matters are in dispute as to actual malice. In this situation, "[i]t would be monstrous to suppose that the arm of the Judiciary of Georgia was too short, or too weak, to reach and relieve. . . ." *Rogers v. Atkinson*, 1 Ga. 12, 25 (1846). Admittedly, this is a case which depends in large part on how one views the circumstances, but there are enough circumstances here for the jury to be doing the viewing regarding the correct viewpoint or point of view under existing law.

BENHAM, Judge, dissenting.

Because I cannot agree with the majority's holding that appellant has shown by "clear and convincing evidence" that appellee acted with actual malice, I must dissent.

Appellant maintains that appellee had the requisite actual malice because appellee knew the letter was false or recklessly disregarded the true facts. The facts, as memorialized in a ten-page memorandum by the head of the special prosecution division of the State Law Department who summarized the investigative file of the Georgia Bureau of Investigation, are as follows: On August 24, 1984, two trucking officials whose company's application for a certificate amendment had been denied by a PSC hearing officer, obtained $800 each from their personal checking accounts and went to Barber's office where each gave him four $100 bills in an envelope bearing the donor's return address. They then discussed the hearing officer's decision and the appellate process. Barber filed campaign financial disclosure reports in August and

October 1984 that did not reflect the receipt of the $800 from the trucking officials. Four days after the visit to Barber, one of the trucking officials visited another PSC commissioner who refused the official's offer of money. The commissioner mentioned the attempted bribe at a subsequent meeting of all the PSC commissioners. Ten days after receiving the money. Barber called the official who had contacted the other commissioner and told him to stay away from that commissioner. In November 1984, after Barber visited the Georgia Attorney General and reported he had $1,000 in cash that had been given to him as a campaign contribution, GBI agents and the head of the State Law Department's special prosecution division visited Barber who told them of the trucking officials' visit; stated he had no recollection of receiving money from them in 1984 but thought he might have since they had given him money in 1982; and denied that he had talked with anyone about the officials' PSC case. He later admitted that he had spoken with the trucking firm's attorney about the case. Barber later gave to the GBI the $800 in cash, in the original envelopes, stating he had no recollection of a 1984 contribution from the trucking officials. On November 29, 1984, Barber filed an amended campaign financial disclosure report that reflected the receipt of $800 from the trucking officials. In February 1985, the Attorney General informed Barber and his attorneys that he intended to present to the Fulton County Grand Jury a proposed indictment charging Barber with bribery, but would forego that action if Barber resigned from his office. Ten days later Barber resigned and the Attorney General agreed to make no presentment to the grand jury concerning the $800 payment by the trucking

officials to Barber. The following day, the trucking officials were charged in an indictment with bribery. (While the memo does not make the distinction, other documents in the GBI file on the PSC investigation reflect that the trucking officials were indicted for attempting to bribe two other members of the PSC, not appellant.) One official pled nolo contendere to one count and was given a one-year sentence, suspended upon the payment of a $10,000 fine and restitution of $2,000. Charges against the other trucking official were dropped. The $800 was returned to the trucking officials.

The following facts are discerned from various depositions given and affidavits executed in this matter. In February 1985, the Attorney General, in the presence of appellee and the head of the special prosecution division, briefed the governor on the investigation and informed him that there was sufficient evidence to present to a grand jury. The Attorney General expressed his desire to give Barber the opportunity to resign in exchange for the Attorney General's decision not to seek an indictment. Since the Attorney General had presentments prepared, the governor believed that the evidence seemed more than sufficient to seek an indictment. In his affidavit, appellee Perdue swore he heard the Attorney General tell the governor that he considered the case against Barber to be strong and conviction likely, and that the governor concurred that the evidence was more than sufficient to seek an indictment. In a deposition, Perdue recalled the Attorney General saying that the evidence that Barber had taken a bribe was overwhelming. No other attendee of the meeting recalls the Attorney General discussing the likelihood of conviction. Two days after the governor's

meeting with the Attorney General, Perdue talked with Phil Peters, the Director of the GBI, who, according to Perdue, opined that Barber had taken a bribe. According to his affidavit and deposition, Perdue, while preparing the letter now at issue, reviewed the GBI file on Barber, particularly the file summary memo, although he did not read every page contained in the file. He telephonically sought the assistance of the Attorney General on the "technical" aspects of the letter's second paragraph. In his deposition, the Attorney General confirmed that Perdue had called him, and recalled that Perdue wanted to ensure that he was accurately characterizing what had transpired with Barber, Perdue swore he made the changes suggested by the Attorney General, and gave the letter to the governor's press secretary in order that she might edit it. In an effort to ensure that the letter "tracked" the GBI file accurately, Perdue asked the press secretary to give the letter to the governor's assistant legal counsel for his review and opinion. Perdue swore that the press secretary told him that the legal counsel had compared the letter to the GBI file and had opined that it was consistent with the GBI file and the file summary memo. The press secretary testified that she proofread the draft and, at Perdue's request, gave it to the governor's assistant legal counsel for review to ensure the letter was consistent with the GBI file. The assistant legal counsel informed her that he had reviewed the letter and found it to be consistent with the file and the file summary memo, which information she relayed to Perdue. The assistant legal counsel executed an affidavit in which he stated that he had reviewed the letter and

had concluded that the representations made therein concerning Barber were consistent with the file summary memo and the file.

Concerning the contents of the letter, Perdue acknowledged that he knew when he wrote the letter that Barber had not been charged with bribery. The assistant legal counsel acknowledged that he knew at the time he reviewed the letter that the trucking official had never been charged with bribing Barber. The Attorney General testified that the second sentence of the second paragraph was accurate with the qualification that one is never sure of an indictment or a conviction. After studying the third sentence of the second paragraph, the Attorney General pointed out an inaccuracy in that the trucking official, having pled nolo contendere, had not been convicted. He did agree that it would be "natural and normal" to infer from the letter that the trucking official had been convicted and fined for bribing Barber, which inference was factually incorrect. The assistant legal counsel also acknowledged that a reasonable man could have inferred that the third sentence of the second paragraph referred to a conviction for bribing Barber. The head of the special prosecution division testified that while he thought it was "dangerous" to write a letter saying that Barber had accepted a bribe, such a letter would be accurate. He agreed that the third sentence of the second paragraph could be interpreted as saying that the official gave Barber money and was convicted for that action. Concerning the reference to Sam Caldwell, Perdue testified that he believed both Caldwell and Barber had betrayed the public trust and embarrassed state government. The Attorney

General testified that he would not have made a comparison of Barber with Caldwell.

In support of his contention that Perdue acted with actual malice, appellant questions Perdue's motives in authoring and publishing the letter. Perdue swore that he had no personal malice or animosity for appellant. "[I]n the world of debate about public affairs, many things done with motives that are less than admirable are protected by the First Amendment. In *Garrison v. Louisiana*, 379 U.S. 64 (85 SC 209, 13 LE2d 125) (1964), [the U.S. Supreme Court] held that even when a speaker or writer is motivated by hatred or ill-will his expression was protected by the First Amendment: 'Debate on public issues will not be uninhibited if the speaker must run the risk that it will be proved in court that he spoke out of hatred; even if he did speak out of hatred, utterances honestly believed contribute to the free interchange of ideas and the ascertainment of truth.' Id., at 73. Thus, while such a bad motive may be deemed controlling for purposes of tort liability in other areas of the law, we think the First Amendment prohibits such a result in the area of public debate about public figures." *Hustler Magazine v. Falwell*, 485 U.S. 46, 53 (108 SC 876, 99 LE2d 41) (1988). "Constitutional malice does not involve the motives of the speaker or publisher, though they may be wrong. . . ." *Williams v. Trust Co.*, 140 Ga. App. 49, 56 (230 SE2d 45) (1976).

Appellant also finds actual malice in Perdue's failure to investigate. "[R]eckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing.

There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication. Publishing with such doubts shows reckless disregard for truth or falsity and demonstrates actual malice." *St. Amant v. Thompson*, 390 U.S. 727, 741 (88 SC 1323, 20 LE2d 262) (1968). In both his affidavit and his deposition, Perdue remains constant on the point that he believed the accuracy of the facts as he stated them in the letter, and continues to believe them. While appellee cannot "automatically insure a favorable verdict by testifying that he published with a belief that the statements were true" (*St. Amant v. Thompson*, supra, at 732), appellant has failed to present clear and convincing evidence of reckless disregard on appellee's part, i.e., that appellee entertained serious doubts as to the truth of his publication. Id. at 731. "Neither lies nor false communications serve the ends of the First Amendment, and no one suggests their desirability or further proliferation. But to insure the ascertainment and publication of the truth about public affairs, it is essential that the First Amendment protect some erroneous publications as well as true ones." *St. Amant v. Thompson*, supra at 732. Without determining whether appellee's statements were true, I must conclude that inasmuch as appellant failed to prove with clear and convincing evidence that appellee published the material with actual malice, this court should affirm the judgment of the trial court.

In its reliance on inferences based on circumstantial evidence, the majority loses sight of the standard of proof it espoused at the outset of its opinion: actual malice must be proved by clear and convincing evidence. The "objective undisputed facts" which the majority holds out

as having a bearing on the issue of malice are not so objective as is asserted. Most of those "objective facts" show only that the events giving rise to this action were political in nature. I am not ready to asserted that the fact that speech occurs in the context of political activity, that it is intended to discredit a candidate for office to whom the speaker is politically opposed, that the communication is on a private letterhead, and that it was made for the purpose of influencing votes is evidence of actual malice. Such a holding, which is what the majority advances, would seriously inhibit the heretofore uninhibited give-and-take which is inherent in the political process in this country. The majority's insistence that appellee had access to the "true facts" is inconsistent with its characterization of the matters asserted by appellee as untested in court: the "true facts" relied on by the majority are largely from the same sources relied on by appellee and were no more validated by a court than were the "facts" relied upon by appellee.

The libel laws of this nation, as applied to public figures such as appellant, do not require that the speaker be correct in his assertions, only that such misstatements as may be made are made without actual malice. Appellee put forth undisputed evidence that he did not act with actual malice. The cases cited by the majority require that a plaintiff bear a heavy burden in order to show actual malice on the part of one who takes part in the spirited debate which characterizes this country's political and governmental processes. Appellant did not bear that burden. A web of inferences, in the face of direct evidence to the contrary, simply does not rise to the level of clear and

convincing evidence. The trial court was correct in granting summary judgment to appellee, and I would affirm that judgment.

I am authorized to state that Presiding Judge McMurray, Judge Birdsong, and Judge Sognier join in this dissent.

DECIDED DECEMBER 20, 1989 –
REHEARING DENIED JANUARY 23, 1990 – CERT. APPLIED FOR.

Libel. Fulton Superior Court. Before Judge Jenrett.

James A. Mackay, Cook & Palmour, Bobby Lee Cook, for appellant.

Chilivis & Grindler, Nickolas P. Chilivis, Gary G. Grindler, Glass, McCullough, Sherrill & Harrold, Robert S. Jones, L. James Weil, Jr., Hull Towill, Norman & Barrett, David E. Hudson, for appellee.

APPENDIX B

JUDGMENT, SUPERIOR COURT OF FULTON COUNTY, GEORGIA

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

J. MAC BARBER,	)	
Plaintiff,	)	
	)	CIVIL ACTION
v.	)	FILE NO.
	)	D-47235
TOM PERDUE,	)	
	)	
Defendant.	)	(Filed Aug. 31,
	)	1988)

ORDER

The above matter having come on regularly for a hearing on Defendant's Motion for Summary Judgment, and after hearing arguments of the parties and after considering the entire record on file in this case, it is considered, ordered and adjudged that the pleadings, depositions, and other discovery material, together with the affidavits, show that there is no genuine issue as to any material fact and that the Defendant is entitled to judgment as a matter of law.

Wherefore, summary judgment is hereby rendered in favor of the Defendant and against the Plaintiff.

SO ORDERED this 31st day of Aug, 1988.

/s/ Isaac Jenrette
JUDGE ISAAC JENRETTE
Atlanta Judicial Circuit

APPENDIX C

ORIGINAL OPINIONS OF THE GEORGIA COURT OF APPEALS (WITHDRAWN)

DEC 5 1989

In the Court of Appeals of Georgia

A89A1420. BARBER V. PERDUE. 158.

BENHAM, Judge.

Appellant Jack McWhorter "Mac" Barber filed a lawsuit against appellee Tom Perdue, a former administrative aide to the governor, alleging that Perdue had libeled and slandered Barber. This appeal follows the grant of summary judgment to Perdue.

The alleged libel was contained in a letter sent out by Perdue in August 1986 to approximately 350 various city and county officials throughout Georgia during the 1986 political campaign for a seat on the Public Service Commission. Appellant resigned from the PSC seat in February 1985 and then qualified to run in the 1986 election against Gary Andrews, a recent appointee to the position from which Barber had resigned. In July 1986, an Andrews press conference was held at which certain public documents from an investigative file on Mac Barber were released, followed by a letter from Tom Perdue to various people throughout the State, which letter included a statement abut the integrity of Barber and the circumstances which led to his resignation. On or about August 2, 1986, Perdue sent the following letter:

> Lately, I have called on you often to ask for your assistance, and there is no way to really express in a letter my appreciation for the consideration and response you have provided. Now, once again, I must ask for your help.
>
> A year and a half ago, a Public Service Commissioner betrayed the public trust and tarnished his own reputation and, indirectly, that

of all public officials by accepting what amounted to a bribe. When confronted with the fact that the Attorney General and the Georgia Bureau of Investigation had this information and were about to seek a felony indictment, Mac Barber chose to resign his office rather than face the prospect of indictment and conviction. The trucking company official who gave Mac Barber the money was convicted and fined a total of $12,000.00!

This situation has occurred twice since governor Harris has been in office. The first official was, as you remember, Sam Caldwell, who also betrayed the public trust and later was convicted of defrauding the state. Under pressure, he resigned as Labor Commissioner. To my way of thinking, Mac Barber and Sam Caldwell are two of the biggest embarrassments that state government has ever suffered.

As specified by the State Constitution, when these vacancies occurred, Governor Harris was required to make appointments to fill them. In the case of the labor Commissioner, the Governor appointed Joe Tanner, and in the case of the Public Service Commissioner, he appointed Gary Andrews. In contrast to their predecessors, these two men epitomize what a public servant should be. They have integrity and character and stand for what is right, good, and fair. While managing the responsibilities of their jobs, they also have had to rebuild the public trust and confidence Mac Barber and Sam Caldwell destroyed in those positions and in state government.

My request of you at this time is that you please do everything you possibly can during the last week of the campaign to make sure that Gary Andrews and Joe Tanner are elected. The

> people of Georgia deserve officials they can trust and honesty in state government.

The alleged slander consisted of Perdue's comments to an Albany newspaper reporter along the same lines as the letter.

"A libel is a false and malicious defamation of another, expressed in print . . . , tending to injure the reputation of the person and exposing him to public hatred, contempt, or ridicule." OCGA § 51-5-1 (a). "Libel per se consists of a charge that one is guilty of a crime, dishonesty or immorality. [Cit.]" *Grayson v. Savannah News-Press*, 110 Ga. App. 561, 566 (139 SE2d 344) (1964). "Slander or oral defamation consists in: (1) Imputing to another a crime punishable by law. . . . " OCGA § 51-5-4 (a). Bribery is such a crime. OCGA § 16-10-2.

Appellant concedes, for purposes of this action, that he is a "public figure" who is prohibited "from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice' – that is, with knowledge that it was false or with reckless disregard of whether it was false or not." *New York Times v. Sullivan*, 376 U.S. 254, 279-280 (84 SC 710, 11 LE2d 686) (1964). Inasmuch as the First Amendment mandates that a public figure/plaintiff prove actual malice by clear and convincing evidence (Id. at 285-286; *Williams v. Trust Co. of Ga.*, 140 Ga. App. 49, 52 (230 SE2d 45) (1976)), "a court ruling on a motion for summary judgment [in such a case] must be guided by the *New York Times* 'clear and convincing' evidentiary standard in determining whether a genuine issue of actual malice exists – that is, whether the evidence presented is such that a reasonable jury might find that

actual malice had been shown with clear and convincing clarity." *Anderson v. Liberty Lobby, Inc.*, 477 U. S. 242, 257 (106 SC 2505, 91 LE2d 202) (1986).

Appellant maintains that appellee had the requisite actual malice because appellee knew the letter was false or recklessly disregarded the true facts. The facts, as memorialized in a ten-page memorandum by the head of the special prosecution division of the State Law Department who summarized the investigative file of the Georgia Bureau of Investigation, are as follows: On August 24, 1984, two trucking officials, whose company's application for a certificate amendment had been denied by a PSC hearing officer obtained $800 each from their personal checking accounts and went to Barber's office, where each gave him four $100 bills in an envelope bearing the donor's return address. They then discussed the hearing officer's decision and the appellate process. Barber filed campaign financial disclosure reports in August and October 1984 that did not reflect the receipt of the $800 from the trucking officials. Four days after their visit to Barber, one of the trucking officials visited another PSC commissioner who refused the official's offer of money. The commissioner mentioned the attempted bribe at a subsequent meeting of all the PSC commissioners. Ten days after receiving the money, Barber called the official who had contacted the other commissioner and told him to stay away from that commissioner. In November 1984, after Barber visited the Georgia Attorney General and reported he had $1,000 in cash that had been given to him as a campaign contribution, GBI agents and the head of the State Law Department's special prosecution division visited Barber, who told them of the trucking officials'

visit; stated he had no recollection of receiving money from them in 1984 but thought he might have since they had given him money in 1982; and denied that he had talked with anyone about the officials' PSC case. He later admitted that he had spoken with the trucking firm's attorney about the case. Barber later gave to the GBI the $800 in cash, in the original envelopes, stating he had no recollection of a 1984 contribution from the trucking officials. On November 29, 1984, Barber filed an amended campaign financial disclosure report that reflected the receipt of $800 from the trucking officials. In February 1985, the Attorney General informed Barber and his attorneys that he intended to present to the Fulton County Grand Jury a proposed indictment charging Barber with bribery, but would forego that action if Barber resigned from his office. Ten days later Barber resigned, and the Attorney General agreed to make no presentment to the grant jury concerning the $800 payment by the trucking officials to Barber. The following day, the trucking officials were charged in an indictment with bribery. (While the memo does not make the distinction, other documents in the GBI file on the PSC investigation reflect hat the trucking officials were indicted for attempting to bribe two other members of the PSC, not appellant.) One official pled nolo contendere to one count and was given a one-year sentence, suspended upon the payment of a $10,000 fine and restitution of $2,000. Charges against the other trucking official were dropped. The $800 was returned to the trucking officials.

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general and gave the letter to the governor's press secretary in order that she might edit it. In an effort to ensure that the letter "tracked" the GBI file accurately, Perdue asked the press secretary to give the letter to the governor's assistant legal counsel for his review and opinion. Perdue swore that the press secretary told him that the legal counsel had compared the letter to the GBI file and had opined that it was consistent with the GBI file and the file summary memo. The press secretary testified that she proofread the draft and, at Perdue's request, gave it to the governor's assistant legal counsel for review to ensure the letter was consistent with the GBI file. The assistant legal counsel informed her that he had reviewed the letter and found it to be consistent with the file and the file summary memo, which information she relayed to Perdue. The assistant legal counsel executed an affidavit in which he stated that he had reviewed the letter and had concluded that the representations made therein concerning Barber were consistent with the file summary memo and the file.

Concerning the contents of the letter, Perdue acknowledged that he knew when he wrote the letter that Barber had not been charged with bribery. The assistant legal counsel acknowledged that he knew at the time he reviewed the letter that the trucking official had never been charged with bribing Barber. The attorney general testified that the second sentence of the second paragraph was accurate with the qualification that one is never sure of an indictment or a conviction. After studying the third sentence of the second paragraph, the attorney general pointed out an inaccuracy in that the trucking official, having pled nolo contendere, had not been convicted. He

did agree that it would be "natural and normal" to infer from the letter that the trucking official had been convicted and fined for bribing Barber, which inference was factually incorrect. The assistant legal counsel also acknowledged that a reasonable man could conclude that the third sentence of the second paragraph referred to a conviction for bribing Barber. The head of the special prosecution division testified that while he thought it was "dangerous" to write a letter saying that Barber had accepted a bribe, such a letter would be accurate. He agreed that the third sentence of the second paragraph could be interpreted as saying that the official gave Barber money and was convicted for that action. Concerning the reference to Sam Caldwell, Perdue testified that he believed both Caldwell and Barber had betrayed the public trust and embarrassed state government. The attorney general testified that he would not have made a comparison of Barber with Caldwell.

In support of his contention that Perdue acted with actual malice, appellate questions Perdue's motives in authoring and publishing the letter. Perdue swore that he had no personal malice or animosity for appellant. "[I]n the world of debate about public affairs, many things done with motives that are less than admirable are protected by the First Amendment. In *Garrison v. Louisiana*, 379 U. S. 64 (85 SC 209, 13 LE2d 125) (1964), [the U.S. Supreme Court] held that even when a speaker or writer is motivated by hatred or ill-will his expression was protected by the First Amendment: 'Debate on public issues will not be uninhibited if the speaker must run the risk that it will be proved in court that he spoke out of hatred; even if he did speak out of hatred, utterances

honestly believed contribute to the free interchange of ideas and the ascertainment of truth.' Id., at 73. Thus, while such a bad motive may be deemed controlling for purposes of tort liability in other areas of the law, we think the First Amendment prohibits such a result in the area of public debate about pubic figures." *Hustler Magazine v. Falwell*, 485 U. S. 46, 53 (___ SC ___, ___ LE2d ___) (1988). "Constitutional malice does not involve the motives of the speaker or publisher, though they may be wrong. . . . " *Williams v. Trust Co.*, supra at 56.

Appellant also finds actual malice in Perdue's failure to investigate. "[R]eckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication. Publishing with such doubts shows reckless disregard for truth or falsity and demonstrates actual malice." *St. Amant v. Thompson*, 390 U. S. 727, 731 (88 SC 1323, 20 LE2d 262) (1968). In both his affidavit and his deposition, Perdue remains constant on the point that he believed the accuracy of the facts as he stated them in the letter, and continues to believe them. While appellee cannot "automatically insure a favorable verdict by testifying that he published with a belief that the statements were true" (id. at 732), appellant has failed to present clear and convincing evidence of reckless disregard on appellee's part, i.e., that appellee entertained serious doubts as to the truth of his publication. Id. at 731. "Neither lies nor false communication serve the ends of the First Amendment, and no one suggests their desirability or further proliferation. But to insure the

ascertainment and publication of the truth about public affairs, it is essential that the First Amendment protect some erroneous publications as well as true ones." *St. Amant v. Thompson*, supra at 732. Without determining whether appellee's statements were true, we conclude that, inasmuch as appellant failed to prove with clear and convincing evidence that appellee published the material with actual malice, we must affirm the judgment of the trial court.

The dissent is premised on the belief that "a factual issue exists over the determinative question of actual malice," and concludes that Perdue "crossed the line into constitutional malice." However, the cases cited by the dissent, *Jordan v. Hancock*, 91 Ga. App. 467 (86 SE2d 11) (1955), and *Stone v. McMichen*, 186 Ga. App. 510 (367 SE2d 839) (1988), concern neither public figures nor "constitutional" malice. Faced with Perdue's steadfast assertion that he believed the truth of the contents of his letter, the dissent maintains that Perdue exhibited actual malice because he knew, or absent a reckless disregard for the truth, would have known the falsity of an implication derived from a sentence in his letter. Conspicuously absent from the dissent are the facts which support such a conclusion. In addition, the dissent's implicit reliance on the deposition testimony of the head of the law department's special prosecution division to prove Perdue's malice is misplaced. Since, as the dissent recognizes, that deposition was taken in December 1987, sixteen months *after* Perdue published the letter at issue, it is undisputed that Perdue did not receive the division head's opinion prior to publishing the letter.

In the absence of clear and convincing proof of actual malice, the trial court's grant of summary judgment to appellee must be affirmed.

Judgment affirmed. McMurray, P. J., and Birdsong, Sognier, and Pope, JJ., concur. Carley, C. J., Deen, P. J., Banke, P. J., and Beasley, J., dissent.

A89A1420. BARBER v. PERDUE. (Ben-158)

DEEN, Presiding Judge, dissenting.

"The privilege of poisoning one's enemy is not a thing of value," *Foster v. State*, 8 Ga. App. 119, 123 (68 SE 739) (1910), but it may be a constitutional right, even where the poisoning is verbal, vociferous, and vexatious, and the victim is a public figure. However, notwithstanding the liberties afforded in the course of political zeal and public debate about public figures, poison falsely served with actual malice is still actionable. Because I believe that a factual issue exists over the determinative question of actual malice in the instant case, I must respectfully dissent.

"Malice in the constitutional sense is distinguished from the common law sense of ill will, hatred, or 'charges calculated to injure' . . . Constitutional malice does not involve the motives of the speaker or publisher, though they may be wrong, but rather it is his awareness of actual or probable falsity, or his *reckless disregard* for their falsity." *Williams v. Trust Co. of Ga.*, 140 Ga. App. 49, 55-56 (230 SE2d 45) (1976). (Emphasis supplied.) In the instant

case, it was uncontroverted that Perdue intended to injure Barber's reputation; it is all apparent from his acts of affirmative action in seeking assistance of the attorney general in formulating part of the letter, and having the governor's press secretary edit the letter, that he was deleterious, dedicated, and deliberate in designing his attack on Barber's integrity, impartiality, image, and independence. The head of the special prosecution division stated in his deposition (albeit 16 months after the letter was published) that it would be dangerous to send out this type letter. He explained his use of the word "dangerous" as meaning there was a potential for a lawsuit.

That desire, deliberation, and design to injure, alone, would not suffice to prove libel or slander of a public figure. However, I believe that, considering facts such as the conspicuous juxtaposition of Perdue's (a) accusation of Barber accepting a bribe with (b) the factually misleading statement that "[t]he trucking company official who gave Mac Barber the money was convicted and fined a total of $12,000.00," along with (c) Perdue's statement to Barber regarding Barber's intention to run for re-election to the Public Service Commission, "We could sure use that seat," combined with admissions as to his letter being intended to brand Barber as a "crook" and in the "same category as Sam Caldwell," see *Jordan v. Hancock*, 91 Ga. App. 467 (86 SE2d 11) (1955) (liar, crook, thief, and cheat); *Stone v. McMichen*, 186 Ga. App. 510 (367 SE2d 839) (1988) (crook and thief), Perdue misplaced his calculations and confidence in his cleverness and crossed over the line into constitutional malice. Implicit in the juxtaposition noted above is the representation that the trucking official was convicted of bribing Barber, which Perdue

knew to be false or *would have known absent a reckless disregard for the truth.*

The majority opinion relies on *Hustler Magazine v. Falwell,* 485 U.S. 46, 53 (___ SC ___, ___ LE2d ___) (1988). Language used in this cited case suggested that Falwell is a public figure, and his first sexual experience was incest with his mother in an outhouse. These expressions, made in a sexual context, are about on par, or possibly stronger and more unsavory, than the letter sent out to some 350 city and county officials, done in a political context, in the instant case. The distinction, difference, and distinguishing discernment in the two being, the former made in a magazine, was labeled a "parody" and was facetious, felicitous, fanciful, and fictional, while the latter letter is sent out as, and in, a staunchly serious sophisticated scenario. While acknowledging that debate on public issues about public figures should not be curtailed or inhibited, the defense by a private citizen or an elected public official, be he legislator, judge, governor, or other public servant, who is called a "crook," or is labeled guilty of violating our criminal code or of committing a crime, should likewise not be curtailed, chilled, censored, or shortchanged in seeking a jury trial in his challenge in the courts of our state to arrive at truth in the matter where factual matters are in dispute as to actual malice. In this situation, "[i]t would be monstrous to suppose that the arm of the Judiciary of Georgia was too short, or too weak, to reach and relieve . . . " *Rogers v. Atkinson,* 1 Ga. 12, 25 (1846). Admittedly, this is a case which depends in large part on how one views the circumstances, but there are enough circumstances here for the

jury to be doing the viewing regarding the correct viewpoint or point of view under existing law.

A89A1420. BARBER v. PERDUE. (Ben-158)

BEASLEY, Judge, dissenting.

I respectfully dissent because the case is not ripe for summary judgment in favor of defendant as the moving party. As demonstrated by the combination of the majority opinion and the other dissent, and as shown by the four-volume record, there are material factual disputes which are relevant to the issue of knowledge or at least reckless disregard, which themselves are material to the pivotal issue of actual malice in the promulgator's issuance of the statements.

In deciding motions for summary judgment, our rule is the same under OCGA § 9-11-56 as is the rule under FRCP 56. The Supreme Court framed it: "The evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor. *Adickes [v. S. H. Kress & Co.]*, 398 US [144], at 158-159. . . . " *Anderson v. Liberty Lobby, Inc.*, 477 U. S. 242, 255 (106 SC 2505, 91 LE2d 202) (1986); *Eiberger v. West*, 247 Ga. 767 (281 SE2d 148) (1981); *Burnette Ford v. Hayes*, 227 Ga. 551 (181 SE2d 866) (1971). The question of law before us is whether, in this posture, viewing all the direct and circumstantial evidence and reasonable inferences in plaintiff's favor, a jury could find, by clear and convincing evidence, that defendant sent the letter or made any of the untrue statements "with knowledge that it was false or with reckless disregard of

whether it was false or not." *Anderson v. Liberty Lobby, Inc.*, supra at 244 (106 SC 2505, 91 LE2d 202) (1986), quoting *New York Times Co. v. Sullivan*, 376 U. S. 254, 279-280 (84 SC 710, 11 LE2d 686) (1964). Such would constitute the element of actual malice which is an ingredient of a defamation case of this type.

Although "clear and convincing" is a more stringent standard than "preponderating" and requires a greater quantum and a high quality of proof in plaintiff's favor, *Anderson*, supra at 254, it has been recognized that proof of actual malice "does not readily lend itself to summary disposition," *Hutchinson v. Proxmire*, 443 U.S. 111, 120, n. 9 (99 SC 2675, 61 SE2d 411) (1979). See Wright, Miller & Kane, Federal Practice and Procedure: Civil 2d, § 2730, pages 240-245. This is because, as said in *Hutchinson*, proof of actual malice "calls a defendant's mind into question." Proof of state of mind "could be in the form of objective circumstances from which the ultimate fact could be inferred" as well as direct evidence from defendant. *Herbert v. Lando*, 441 U. S. 153, 160 (99 SC 1635, 60 LE2d 115) (1979). Because of the very nature of this element of the tort, *Herbert* pointed out that "[c]ourts have traditionally admitted any direct or indirect evidence relevant to the state of mind of the defendant and necessary to defeat a conditional privilege or enhance damages." Id. at 165.

Because of the opportunities for having or obtaining, from objective sources, a knowledge of the true facts prior to publication of the statements, which on their face were libelous if not true, OCGA § 51-5-4 (a), defendant has not conclusively eliminated a finding of actual malice which is based on clear and convincing evidence. Much

of what is in dispute depends, for its resolution, on the credibility of witnesses. Defendant's own denial of actual malice is not conclusive in the presence of evidence to the contrary. *St. Amant v. Thompson*, 390 U.S. 727, 732 (88 SC 1323, 20 LE2d 262, 268) (1968). Not only direct evidence, but circumstantial evidence and reasonable inferences, are for a fact-finder's sifting.

That is outside of our circumscribed function as an appellate court, *Guye v. Home Indem. Co.*, 241 Ga. 213 (244 SE2d 864) (1978), and was so for the trial court. OCGA §§ 24-9-80, 9-11-56. As the Supreme Court reiterated in the *Anderson* summary judgment case, supra at 255: "Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, [when] he is ruling on a motion for summary judgment. . . . "

There is evidence that defendant did not personally check the facts before sending them out from his home under the weight of his signature, knowing that he was identified as the governor's administrative aide. He deposed that he reviewed the GBI file, which contained contrary information which at the least could be inferred that defendant "entertained serious doubts as to the truth of his publication." *St. Amant*, supra at 731. Nevertheless, he instructed an assistant counsel to compare what was said in the letter only with what was in the law department's summary memo. Defendant knew from the GBI file, or did not seek to verify otherwise, that the trucking company official's sentence was for an incident not involving Barber. If he knew this to be true, a jury could infer that its inclusion in the letter about Barber was a deliberate implication that Barber's guilt, though not

established by convicton, [sic] was a confirmed fact or at least a foregone conclusion upon which the letter recipients could rely in acting.

In addition, the law department memo itself stated that the official pleaded nolo contendere and was given first offender status; it was not a conviction, not a finding of guilt. Yet the jury could find that the letter-writer's statement clearly implied that the official was guilty as a matter of law, and that he parlayed this as fact to verify the guilt of plaintiff in the same transaction.

In addition, there is undisputed evidence that defendant knew that plaintiff had not been convicted or even indicted for bribery yet stated that he was guilty of it. A jury can reasonably infer that he stated his opinion as though it were an official fact, despite the accusation's not having been proved beyond a reasonable doubt in a court of law. Adding the words "what amounted to" does not detract from the direct statement that Barber accepted a bribe, for it can reasonably be construed to mean only that it was ostensibly given for another purpose. Whether Barber would have been convicted or not is fraught with the imprecision of the application of the bribery law, OCGA § 16-10-2, in "campaign contribution" cases, as illustrated by the recent case of *State v. Agan*, Ga. (Case No. 46967, decided October 26, 1989).

The letter also states that the reason Barber resigned was that he chose resignation rather than indictment "and conviction," as though conviction were a certainty. Defendant had no basis on which to draw such an unqualified conclusion, nor did he know what motivated Barber to resign; yet a jury could find that he implied it

was attributable to an acknowledgment of guilt, despite Barber's denial to this day of any wrongdoing. This statement, too, was used in the letter to verify the truth of the statement that Barber had accepted a bribe.

The majority opinion states the "facts" to be as set out in the state law department memorandum, but these are not legally established facts at all. They are the results of investigation, made for the purpose of possible prosecution; they were never tested in a court of law and many of them remain in dispute in this separate civil case, as is apparent from plaintiff's evidence. It, for one thing, weaves other assertions of fact into the outline to give what plaintiff contends to be a more complete picture.

Among the objective undisputed facts which have a bearing on the issue of actual malice are that defendant had access to the true facts, that this action was taken by defendant in an effort to discredit plaintiff as one who should be returned again to the state's Public Service Commission, that it was done in the heat of political campaign, that it was directed to local officials to influence them, that it was done with an assessment that it would have an impact on significant numbers of votes, that it was accomplished not as an official act but as a personal communication outside the governor's office. Disputed was whether defendant knew of the doubts which the GBI and the attorney general and law department had.

The subtlety inherent in ascertaining a person's state of mind, and the nuances discernible from objective and not only subjective evidence, in this case where plaintiff

has come forth with disputing evidence on material facts about what defendant knew and upon what basis he acted, where plaintiff does not rely on the pleadings or only on the proposition that the jury might disbelieve the defendant's denial of legal malice, see *Anderson,* supra at 256, required the trial court to deny the motion for summary judgment.

I am authorized to state that Chief Judge Carley and Presiding Judge Banke join in this dissent.

APPENDIX D

Order Granting Motion For Rehearing (and substitution opinions), Georgia Court of Appeals

Court of Appeals
of the State of Georgia

ATLANTA,

December 20, 1989

The Honorable Court of Appeals met pursuant to adjournment.

The following order was passed:

A89A1420. J. MAC BARBER v. TOM PERDUE

Upon consideration of the motion for rehearing filed on behalf of appellant in the above styled case, it is hereby ordered that the opinion of this Court issued on and the judgment entered on December 5, 1989 be hereby vacated and that said opinion be withdrawn from the files. It is further ordered that the opinion attached hereto be substituted for the opinion issued December 5, 1989,* and judgment shall issue accordingly.

It is further ordered that the September term relative to this case be extended to enable the appellee to file a motion for rehearing. *Stuckey v. Richardson*, 188 Ga. App. 147, 149 (4) (372 SE2d 458) (1980).

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*The opinion attached may be found at A1 – 20 and is therefore not reprinted in this Appendix.

Court of Appeals of the State of Georgia

Clerk's Office, Atlanta DEC 20 1989

I certify that the above
is a true extract from the minutes
of the Court of Appeals of Georgia.

Witness my signature and the
seal of said court hereto
affixed the day and year
last above written.

/s/ Victoria McLaughlin
Clerk.

APPENDIX E

Order Denying Motion For Rehearing (and adding concurring opinion), Georgia Court of Appeals

Court of Appeals
of the State of Georgia

ATLANTA,

January 23, 1990

The Honorable Court of Appeals met pursuant to adjournment.

The following order was passed:

A89A1420. J. MAC BARBER v. TOM PERDUE

Upon consideration of the motion for rehearing filed on behalf of appellee in the above styled case, it is hereby ordered that the specially concurring opinion attached hereto be substituted for the specially concurring opinion dated December 20, 1989.* Motion for rehearing is hereby denied.

Court of Appeals of the State of Georgia

Clerk's Office, Atlanta JAN 23 1990

I certify that the above is a
true extract from the minutes of
the Court of Appeals of Georgia.

Witness my signature and the seal
of said court hereto affixed the
day and year last above written.

/s/ Victoria McLaughlin
Clerk.

---

*The specially concurring opinion of Judge Deen may be found at A9 – 12 and is therefore not reprinted in this Appendix.

APPENDIX F

Denial of Petition For Writ Of Certiorari, Georgia Supreme Court

SUPREME COURT OF THE STATE OF GEORGIA

CLERK'S OFFICE

ATLANTA

DATE: JUNE 21, 1990

Gary G. Grindler
Chilivis & Grindler
1327 Maple Drive
Atlanta Ga 30305

Case No. S90C0626

TOM PERDUE V. J. MAC BARBER

COURT OF APPEALS CASE NO. A89A1420

The Supreme Court today denied the petition for certiorari in this case.

All the Justices concur, except Hunt and Fletcher, JJ., who dissent, and Benham, J., not participating.

Very truly yours,
JOLINE B. WILLIAMS, Clerk

APPENDIX G

Denial of Motion For Reconsideration, Georgia Supreme Court

JUL 30 1990

SUPREME COURT OF GEORGIA

ATLANTA JULY 27, 1990

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed:

Case No. S90C0626

TOM PERDUE V. J. MAC BARBER

Upon consideration of the Motion for Reconsideration filed in this case, it is ordered that it be hereby denied.

All the Justices concur, except Hunt and Fletcher, JJ., who dissent, and Benham, J., not participating.

SUPREME COURT OF THE
STATE OF GEORGIA

Clerk's Office, Atlanta

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court affixed the day and year last above written.

Joline B. Williams, Clerk.

APPENDIX H

Letter

4090 Northside Drive, N.W.
Atlanta, Georgia 30342
August 2, 1986

Honorable M. E. Garrison
Mayor of Homer
Post Office Box 146
Homer, Georgia 30547

Dear Mayor Garrison:

Lately, I have called on you often to ask for your assistance, and there is no way to really express in a letter my appreciation for the consideration and response you have provided. Now, once again, I must ask for your help.

A year and a half ago, a Public Service Commissioner betrayed the public trust and tarnished his own reputation and, indirectly, that of all public officials by accepting what amounted to a bribe. When confronted with the fact that the Attorney General and the Georgia Bureau of Investigation had this information and were about to seek a felony indictment, Mac Barber chose to resign his office rather than face the prospect of indictment and conviction. The trucking company official who gave Mac Barber the money was convicted and fined a total of $12,000.00!

This situation has occurred twice since Governor Harris has been in office. The first official was, as you remember, Sam Caldwell, who also betrayed the public trust and later was convicted of defrauding the state. Under pressure, he resigned as Labor Commissioner. To my way of thinking, Mac Barber and Sam Caldwell are two of the biggest embarrassments that state government has ever suffered.

As specified by the State Constitution, when these vacancies occurred, Governor Harris was required to make appointments to fill them. In the case of the Labor Commissioner, the Governor appointed Joe Tanner, and in the case of the Public Service Commissioner, he appointed Gary Andrews. In contrast to their predecessors, these two men epitomize what a public servant should be. They have integrity and character and stand for what is right, good and fair. While managing the responsibilities of their jobs, they also have had to rebuild the public trust and confidence Mac Barber and Sam Caldwell destroyed in those positions and in state government.

My request of you at this time is that you please do everything you possibly can during the last week of the campaign to make sure that Gary Andrews and Joe Tanner are elected. The people of Georgia deserve officials they can trust and honesty in state government.

With kindest personal regards, I am

Sincerely,

/s/ Tom
Tom Perdue

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(2)

No. 90-502

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1990

TOM PERDUE,
Petitioner,

v.

J. MAC BARBER,
Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE GEORGIA COURT OF APPEALS

James A. Mackay*
c/o Cook & Palmour
Cook Building
Summerville, Georgia 30747
(404) 857-3421

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Cook & Palmour
Cook Building
Summerville, Georgia 30747
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STATEMENT OF THE CASE

Many of the factual errors contained in the Petition for Certiorari are described in the Argument, below.

SUMMARY OF THE ARGUMENT

The record in this case presents material fact disputes which require a jury trial of the issue of "actual malice." From the evidence of record, a jury may find by clear and convincing evidence that Petitioner Perdue stated false and defamatory facts with knowledge of their falsity or with reckless disregard of their falsity.

The issues which Petitioner frames, and as to which certiorari is requested, are neither fairly presented by this record, nor suitable for certiorari if presented.

ARGUMENT

J. Mac Barber, respondent herein, respectfully opposes the requested writ of certiorari in this case.

With respect, the Petition for Certiorari describes a very different case from the one presented. Petitioner

Perdue's letter uttered false statements of fact which Perdue knew to be false, or whose falsity Perdue recklessly disregarded, and the decision of the Court of Appeals permitting this defamation case to be tried by a jury was correct.

The Petition for Certiorari carefully avoids telling this Honorable Court what Perdue said, preferring for this Court to believe that Perdue expressed only some innocuous opinion "that Barber had taken what amounted to a bribe . . .."

But this Court should note the following fact sentence in Perdue's carefully crafted defamatory letter -- which was sent on the eve of the election to county commissioners, mayors, and many others throughout Georgia:

> "The trucking company official who gave Mac Barber the money was convicted and fined a total of $12,000.00!"

This statement is crafted skillfully to imply that the trucking company official was convicted of bribing Mac Barber -- and that intentional implication was false. The conviction of the trucker was for attempting to bribe, not Mac Barber, but a different commissioner.[1/] Barber was never accused of a crime, and the trucker was never charged with a crime involving Barber. In

---

[1/] It is undisputed that Perdue knew the truckers were being investigated for making or attempting to make contributions to other commissioners than Mac Barber.

addition, the trucker had pleaded nolo. (There were two truckers. The other trucker, also not charged with any crime involving Barber, was nolle prosequi 'd.)

This false sentence was vital to Perdue's defamatory letter, because it sought to add the appearance of "hard fact" and even the appearance of a stamp of judicial approval to Perdue's letter's false claim that Mac Barber took a bribe.

Nowhere in this record has Perdue ever claimed to believe his letter's intentional, false and defamatory implication that the trucker was convicted of bribing Barber. Thus Perdue makes no claim that the falsehood was innocent. Therefore, Perdue has never even made out a prima facie case of constitutional privilege entitling him to summary judgment.

But even if Perdue had made out a prima facie case of privilege, Mac Barber has proved Perdue's "actual malice" by "clear and convincing" evidence and is therefore definitely entitled to a jury trial.

First, there were no facts which could have supported a belief that anyone was convicted of bribing Mac Barber. Perdue has never pointed to any such facts, and his Petition for Certiorari is studiously silent on the point.

Second, and extremely importantly, Perdue tried not to learn the truth: he did not care enough about the truth to ask the Attorney General whom the trucker was convicted of bribing.

Here is Perdue's deposition testimony on this point:

"Q. Listen to my question carefully. Did you ask Mr. Bowers if this plea of nolo contendere with reference to one of the trucking officials had anything to do with allegations of bribery of Mac Barber or was it someone else?

"A. I did not ask that question specifically because the file, the investigation was all inclusive . . .

* * * *

"Q. Did he tell you what offense he pled to? You must have wanted to know.

"A. He did not tell me what offense that he pled to.

"Q. Did you ask him what offense he pled to, whether it was referenced to alleged bribery to Mac Barber or alleged bribery to Bobby Pafford or to John Brown or to whom?

"A. No, sir. I did not ask that specific question."

* * * *

"Q. Why didn't you ask? Why didn't you ask what he pled to?

"A. I did. He pled nolo contendere.

"Q. To what?

"A. To bribery.

"Q. To bribing who?

"A. I can't answer that."

[Perdue depo., pp. 66-68, Supp. R-70-72.]

Thus, Perdue knowingly implied that the trucker was convicted of bribing Barber, and knew that he had no support for the implication.

A jury may therefore conclude, quite simply, and out of Perdue's own admissions, that Perdue fabricated this charge. Fabrication, of course, is the purest form of "actual malice." As this Court has stated: "Professions of good faith will be unlikely to prove persuasive, for example, where a story is fabricated by the defendant . . .." St. Amant v. Thompson, 390 U.S. 727, 732 (1968).

Any reasonable fact-finder must conclude that, even construed most generously to Perdue, Perdue's admitted failure to ask Attorney General Bowers whom the trucker was convicted of bribing, was reckless disregard for the truth. Whether Perdue fabricated this sentence, or whether he was only reckless in this sentence, is for a jury. Both are "actual malice."

And any reasonable fact-finder must also conclude that Perdue's failure to ask the key question of Attorney General Bowers was, given the clear implication in Perdue's sentence, the "purposeful avoidance of the truth," which is "actual malice" according to Harte-Hanks Communications, Inc. v. Connaughton, ___ U.S. ___, 109 S. Ct. 2678, 2698 (1989).

Contrary to the Petition for Certiorari, Attorney General Bowers has sworn that he did not approve this sentence, and agreed it was false.

Thus, Mac Barber is plainly entitled to a jury trial of his libel suit, and the Georgia Court of Appeals was correct.

Also contrary to the Petition for Certiorari, the Court of Appeals' majority carefully applied the correct standards for determining whether a triable issue of "actual malice" existed.

Perdue's Petition is also wrong in contending there was simply a negligent failure to investigate, and in contending that the key facts are undisputed.

Indeed, material fact disputes pervade this record, and make summary judgment completely unthinkable.

While the Petition for Certiorari declares that it is undisputed that Attorney General Bowers stated in Perdue's presence that "the evidence against Barber was strong, and that a conviction was likely," and that "Perdue never heard . . . Attorney General Bowers . . .

express any doubt as to [the] opinion that Barber had taken a bribe," these statements are not correct. The fact is that Attorney General Bowers expressed, and Deputy Assistant Attorney General Kohler recalled, very serious doubts expressed in the meeting with Perdue about whether Barber had either the "mental state" or the "criminal intent" to commit bribery. There was also serious doubt expressed in the same meeting about whether there was a "quid pro quo" or anything done by Barber in return for the small campaign contribution from the trucker.

Indeed, also contrary to the Petition for Certiorari, Attorney General Bowers never held the "opinion that Barber had taken a bribe . . .." Whether Barber was guilty was an extremely "difficult" question over which the Attorney General "agonized" more than "anything . . . in my life." These doubts were shared with Perdue -- contrary to the Petition for Certiorari. Perdue's phrase at page 6 of the Petition for Certiorari: "their opinion that Barber had taken a bribe," referring to the Attorney General and others, is a complete invention and contrary to fact.

What petitioner includes in his Petition for Certiorari as a statement of "undisputed" facts is in reality a paraphrase of Mr. Perdue's own conclusory affidavit, which in fact is materially disputed in numerous respects throughout the record. Those fact disputes must be tried.

It is of course not Barber's burden to prove Perdue's disregard for the truth out of Perdue's own mouth. As this Court ruled in St. Amant v. Thompson, 390 U.S. 727, 732:

> "The defendant in a defamation action brought by a public official cannot . . . automatically insure a favorable verdict by testifying that he published with a belief that the statements were true. The finder of fact must determine whether the publication was indeed made in good faith."

See also, Hunt v. Liberty Lobby, 720 F.2d 631, 645 (11th Cir. 1983): "[A]n inference of actual malice can be drawn when a defendant publishes a defamatory statement that contradicts information known to him, even when the defendant testifies that he believed that the statement was not defamatory and was consistent with the facts within his knowledge." "[A] publisher cannot feign ignorance or profess good faith when there are clear indications which bring into question the truth or falsity of defamatory statements." Id. at 644, quoting, Gertz v. Robert Welch, Inc., 680 F.2d 527, 538 (7th Cir. 1982), cert. denied, 459 U.S. 1226 (1983) (appeal after retrial following remand by Supreme Court).

There is one more proven fact in this record of which this Court may wish to note. Perdue admits that he decided to attack Mac Barber's integrity in his letter before he attempted to learn any facts or details in the GBI file! Thus the facts didn't matter to Perdue: he

was trying to support a predetermined hypothesis whether it was true or not. And Perdue admits he was trying to cost Mac Barber the election. This state of mind is the motive supporting a finding of "actual malice," as it explains Perdue's willingness to falsify. Gertz, supra (defendant conceived of story line before investigating and tried to make evidence conform); Rebozo v. Washington Post Co., 637 F.2d 375 (5th Cir. 1981), cert. denied, 454 U.S. 964 (1981); Coughlin v. Westinghouse Broadcasting and Cable, Inc., 603 F. Supp. 377, 385 (E.D. Pa. 1985), cert. denied, 476 U.S. 1187 (1986).

In this case, the need for a jury trial is clear, and the Georgia Court of Appeals was correct. Fact disputes are abundant, and a jury may justifiably decide to reject all of Perdue's testimony given the many witnesses who have sworn to facts which contradict Perdue, given the circumstances in which the remarks were made, and given Perdue's admitted motive to attack Barber's integrity.

The case does not fairly present the issues described in the Petition for Certiorari, it is ripe for trial, not summary judgment, and the Petition for Certiorari should be denied.

The issues of law framed by the Petition for Certiorari are not fairly raised in this record, and do not seem worthy of this Court's attention even if they had been fairly raised here. Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986) may or may not be binding in the state courts, but here the Georgia Court of Appeals' majority felt bound by Anderson and faithfully applied it.

And the difference of opinion among the judges in the Georgia Court of Appeals surely had nothing to do with Anderson -- which the dissenters did not even cite. If Anderson is difficult to apply, or if there are "unanswered questions" about Anderson, this Court's remedy should best await a record -- unlike this one -- on which those concerns are voiced by the court or otherwise vividly apparent.

Nor are the other posited bases good reasons for granting the writ of certiorari in this case. The Petition for Certiorari attempts at pages 12-14 to set forth twelve examples of the Georgia Court of Appeals' "distortion" of "substantive constitutional principles." Many of these "examples" stress that Perdue was guilty only of "failure to investigate" and Perdue's Petition suggests that that standard was "repudiated" in St. Amant, supra. But the Georgia Court nowhere ruled that Perdue's "failure to investigate" was sufficient alone to constitute actual malice. And this Court's statement in Harte-Hanks, supra, is applicable here:

> "Although failure to investigate will not alone support a finding of actual malice, see St. Amant 390 U.S. at 731, 733, 88 S.Ct., at 1325, 1326, the purposeful avoidance of the truth is in a different category."

_____ U.S. _____, 109 S. Ct. 2678, 2698. (1989). Taken in context, the Georgia Court of Appeals' remarks to which Perdue objects fairly characterize the facts and circumstances giving rise to a jury issue of "actual malice," and correctly apply governing principles of law.

CONCLUSION

With respect, therefore, Respondent Barber submits that this case not yet tried, and this record of material fact disputes, present no issue which is appropriate or ripe for this Court's review by writ of certiorari.

Respectfully submitted,

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